

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Administrative Penalty
Order Issued to Paul Vadnais and Paul
Vadnais Plumbing and Well Service, Inc.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter was heard by Administrative Law Judge Beverly Jones Heydinger, commencing at 9:30 a.m. on April 16, 1999, in Courtroom 1 of the Office of Administrative Hearings. The hearing was held pursuant to a Notice of and Order for Expedited Administrative Hearing dated April 1, 1998. Susan A. Casey, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, appeared for the Well Management Unit of the Minnesota Department of Health ("the Department"). George T. Stephenson, Attorney at Law, Suite 317, Eagandale Office Center, 1380 Corporate Center Curve, Eagan, Minnesota 55121, appeared for Paul Vadnais and Paul Vadnais Plumbing and Well Service, Inc. ("Vadnais"). The record closed at the conclusion of the hearing on April 16, 1999.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Pursuant to Minn. Stat. § 144.991, subd. 5(e), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least five days. The parties may comment to the Commissioner on the recommendations and the Commissioner must consider the comments in making her final decision. Parties should contact Jan Malcolm, Commissioner, 85 East 7th Place, Suite 400, St. Paul, MN 55101, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issue presented at this hearing was whether Vadnais sealed a well at the home of Grace Christensen, 3690 Howard Avenue, White Bear Lake, Minnesota, in August, 1990. The Department alleges that Vadnais sealed the well, that he did not have a license to seal wells, that he sealed the well improperly, and that he failed to file the necessary well-sealing report with the Department. The Department issued an administrative penalty order of \$1000 for sealing the well without a license. Vadnais contends that he did not seal the well and therefore he contests the violation and the penalty.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Paul Vadnais does business under the name of Paul Vadnais Plumbing and Well Service, Inc. He has been a plumber for about 23 years, operating under his current business name for about 11 years. He has held a master plumber license since March, 1987. At no time has Vadnais held a license to drill, construct, repair or seal a well. He has worked on pumps throughout the years and was issued a limited well-pump-installer license on May 5, 1997. This allows a person to install a well pump or pumping equipment. Minn. Rules, part 4725.0475, subpart 4C.

2. Vadnais did plumbing work for Mrs. Christensen and her husband, now deceased, for many years. From time to time Vadnais was hired to do routine plumbing maintenance and repairs, including sewer maintenance. Mrs. Christensen testified that she and her husband had been satisfied with the work that Vadnais performed, and that they were on friendly terms with Vadnais.

3. The Christensens had a well that was located in a small room at the edge of their basement. In 1959, the Christensens were connected to the city water system and their interior plumbing was disconnected from the well.

4. Mr. Christensen died in 1986. Mrs. Christensen remained in the home, but after three years began to think about selling it. She learned from neighbors that the well would need to be closed before the home could be sold. She contacted Vadnais to close it. She also wanted a new kitchen sink installed. The sink was ordered and a date was set for the work to be done.

5. Mrs. Christensen and Vadnais agree that Vadnais and an assistant came to the Christensen home in August, 1990. Both agree that Vadnais installed a new kitchen sink and the assistant made minor repairs to faucets. Both agree that Vadnais and the assistant removed a well pressure tank from the basement and connected an outdoor faucet.

6. The parties disagree about whether Vadnais sealed Mrs. Christensen's well. Mrs. Christiansen testified that she hired Vadnais to close the well, that Vadnais and a helper worked in the basement for several hours, and that when Vadnais finished, the pipe which stuck up from the well-room floor was cut off and fresh cement covered over the end of the pipe. She saw the pressure tank and another large piece removed from the basement, although she admitted that she is not familiar with the parts of a well.

7. Vadnais denies that he sealed the well. He admits working in the basement with an assistant. He testified that he connected the outdoor faucet to the indoor plumbing by running new copper pipe. He testified that the pressure tank was not connected to the well or any pipes and that he and his assistant simply removed it from the basement. Vadnais denies that he or his assistant removed the pump, sealed the well or mixed or spread any cement. Consequently, he did not file a well-sealing report.

8. Mrs. Christensen testified that Vadnais worked at her home for two days, assisted by a helper on the second day. Vadnais testified that all the work was done in one day. Exhibit 15, the invoice for the work, is dated August 30, 1990 and shows a

total of \$412 for parts, including \$320 for the sink, and \$420 for labor. There is no hourly rate on the bill. There was no testimony about the rates Vadnais ordinarily charged in 1990 or the amount he ordinarily paid a helper. Thus, this exhibit does not clarify the amount of time spent.

9. The bill lists the replacement of the kitchen sink, faucet repair, hook-up of the outside faucet and removal of the well tank. There is no reference to well work. Mrs. Christensen testified that she does not recall looking at the itemization of the work on the bill before she paid it.

10. Mrs. Christiansen testified that Vadnais told her that if anyone asked her who did her well work to say that she didn't remember. Vadnais denies making that statement. At the time, Mrs. Christensen attributed the statement to Vadnais' dispute with his brother that led to a split of the family plumbing business.

11. Photographs of the space where the well was located were introduced into evidence. Exhibits 1 and 2 show a circle of cement approximately 3" in diameter. White streaks surround the circle. Mrs. Christensen testified that this cement was wet when she went to the basement after Vadnais and his assistant completed their work. She recalled thinking that the cement was a little messy and not smooth, but because of its location, she did not complain about it. Exhibit 16 shows the location of the 3" circle, behind a brick safe and support beam in the corner of the room. The Exhibit also shows a larger circle with three rusty-colored spots where the pressure tank had been.

12. Although Vadnais claims that he did not seal the well, he could not recall if the well had already been sealed when he arrived.

13. Vadnais admits he had a friendly relationship with Mrs. Christiansen when he worked for her in 1990.

14. Several years after the work was done, Mrs. Christensen's niece who is in the real estate business noticed that Mrs. Christensen had a glass block inset in her front steps and asked if her well had been sealed. The niece was aware that the well would have to be properly sealed and a report filed with the city in order to sell the house. Upon checking, she discovered that no report had been filed.

15. Patrick Sarafolean is a district hydrologist for the Minnesota Department of Health. According to his phone log, Exhibit 7, Sarafolean received a complaint on April 16, 1997, that there was an improperly sealed well at Mrs. Christensen's home. He called Mrs. Christensen on April 18, 1997 and she told Sarafolean that Vadnais had sealed her well. Sarafolean checked his data base and determined that no well closing report had been filed.

16. On May 2, 1997, Sarafolean inspected the property and took pictures. In his opinion, the inset glass block suggested that the well had been improperly sealed. The block is set in the step directly above the well casing to provide access to the well, and ordinarily the well would be removed through that access. He also inspected the area where the well had been and took photos of the 3" diameter cement circle and its location behind the safe in the basement room. Exhibits 1 and 2. Based on his experience and the location, Sarafolean believes that the circle was a well casing filled with cement and aggregate. Based on the location of the circle, and the imprint from

the pressure tank, Sarafolean is of the opinion that it would be awkward, if not impossible, to properly seal the well without going up through the glass block or moving out the pressure tank. Since the pressure tank was useless without the well, there was no reasonable explanation for leaving it in place if the well had been previously sealed, and no reason to move it out and then put it back in place.

17. On May 5, 1997, Sarafolean contacted Vadnais. Vadnais admitted that he had done work for Mrs. Christensen over the years, that he had put in a sink and cleaned her sewer, but never did well work. Vadnais was told that Sarafolean had a copy of Vadnais' bill stating that Vadnais had removed a well tank. Vadnais replied by asking if it was against the law to remove a well tank. Vadnais was told that Mrs. Christensen had told Sarafolean that Vadnais had closed the well. Vadnais denied it and suggested that Mrs. Christensen may have confused Vadnais with his brother, Roger.

18. Sarafolean had additional conversations with Vadnais and Mrs. Christensen and attempted to get the name of the assistant who worked with Vadnais at the Christiansen home. Vadnais continued to deny that he had done the well work. He was unable to find the assistant's name in his records.

19. On May 9, 1997, the Department sent a Notice of Violation to Vadnais outlining the findings of the Department and requiring Vadnais to hire a licensed well contractor to properly seal Mrs. Christensen's well.^[1] Vadnais sent a letter to the Department on May 20, 1997, restating that he did not seal the well, and that he routinely referred his well work to others.^[2] Sarafolean checked with the two well contractors to whom Vadnais claimed he made referrals. Both contractors denied that Vadnais had made direct referrals to them as early as 1990 and both denied that they had done any work for Mrs. Christensen. One admitted that Vadnais may have given the contractor's name to homeowners, but he was not aware of such referrals.

20. On July 24, 1997, Sarafolean met with other members of the Well Management Unit of the Department of Health to discuss the possible well sealing violations by Vadnais.^[3] The Department issued a notice of proposed penalty in a letter signed by James K. Harris, Enforcement Coordinator, Well Management Unit, on August 25, 1997.^[4]

21. The Well Management Unit concluded that Vadnais had improperly sealed a well, that he did not have the proper license, and that he had not filed the appropriate well sealing report. The Unit considered only the improper well sealing violations in the penalty calculation. It concluded that the violation was serious but not a willful or flagrant violation. Since there were no previous well sealing violations by Vadnais, the violation was not repeated. The Unit decided that a forgivable penalty was warranted since the cost of corrective work was substantial. Although the Unit believed that Vadnais was aware that his actions were illegal, and that he was aware of the licensing requirements, it did not enhance the base penalty amount. The history of past violations, number of violations and economic benefit were also considered but did not affect the penalty amount.

22. Vadnais responded on September 23, 1997, although the response was not introduced as an exhibit. It is referenced in the letter accompanying the Forgivable

Administrative Penalty Order, dated October 24, 1997 and signed by Patricia A. Bloomgren, Director, Division of Environmental Health.

23. Proper well sealing is important. If improperly sealed, a well can serve as a conduit for pollution back to an aquifer that may provide water to others. For this reason, only licensed well contractors are authorized to seal wells, the well must be sealed in a proper manner, and a well sealing report must be filed. A property owner who wants to sell is held responsible for properly closing the well if there is no well sealing report on file.

24. As of the date of hearing, Vadnais has taken no steps to correct the improperly sealed well at Mrs. Christensen's home.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Health have jurisdiction in this case and authority to take the action recommended pursuant to Minn. Stat. §§ 103I.101, 103I.115, 103I.205 and 14.50 (1998).

2. Vadnais received timely and proper notice of the hearing and the Department has complied with all relevant substantive and procedural requirements of statute and rule.

3. The Department has authority to issue correction orders and assess administrative penalties for violations of applicable statutes or rules.^[5] Section 144.99, subds. 1 and 4 authorize the Commissioner of Health to assess a forgivable administrative penalty for violations of Chapter 103I of Minnesota Statutes and Chapter 4725 of the Minnesota Rules.

4. The Department has the burden to establish by a preponderance of the evidence that Vadnais violated rules relating to sealing wells and is subject to the proposed penalty.^[6]

5. To seal a well, a person must have a well contractor's license.

Except as provided in paragraph (b), (c), or (d), a person may not drill, construct, repair, or seal a well unless the person has a well contractor's license in possession.

Minn. Stat. § 103 I. 205, subd. 4 (1998).

6. To assure a public record, a well sealing report must be filed when a well is sealed.

Within 30 days after completion or sealing of a well or boring, the person doing the work must submit a verified report to the commissioner containing the information specified by rules adopted under this chapter.

Minn. Stat. § 103 I. 205, subd. 9 (1998).^[7]

7. The correct procedures and materials for sealing a well are spelled out in the Department's rule.^[8]

8. The Department has established by a preponderance of the evidence that Vadnais improperly sealed the well at Mrs. Christensen's home, that he did not have the proper license to seal the well, and that he failed to file the required report within 30 days of sealing the well.

9. Pursuant to Minn. Stat. § 144.991, subd. 5 (c), "(t)he administrative law judge may not recommend a change in the amount of the proposed penalty unless the administrative law judge determines that, based on the factors in subdivision 1, the amount of the penalty is unreasonable."

10. Penalties must be forgivable "[e]xcept in the case of repeated or serious violations." [9] Calculation must take into account the factors set forth in Minn. Stat. § 144.991, subd. 1, which include the willfulness of the violation, its gravity, the history of past violations, the number of violations the economic benefit gained by the person committing the violation, and such other factors as justice may require. The Department's application of the criteria and proposed forgivable penalty of \$1000 was reasonable.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of Health issue an Order affirming in all respects the Forgivable Administrative Penalty Order issued on October 24, 1997, against Paul Vadnais and Paul Vadnais Plumbing & Well Service, Inc.

Dated this 14th day of May, 1999

BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Tape-recorded (two tapes)

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

The Department has the burden of proving by a preponderance of the evidence that Vadnais sealed the Christiansen's well. In other words, in light of all the evidence, is it more likely than not that Vadnais sealed the well? The Department has shown by a preponderance of the evidence that Vadnais improperly sealed a well without a license and that it assessed a reasonable penalty.

Although the events took place in 1990, Mrs. Christiansen has a fairly detailed recollection of the work she hired Vadnais to do, what she observed while he worked with his assistant, and what she saw after the work was done. Although she is not familiar with the parts of a well, she clearly recalls that the pipe which had stuck up from the floor was gone and there was some fresh cement covering the hole. It's apparent from the photos that the floor was painted while the pressure tank was still in place and before the cement was applied. The photos also corroborate Sarafolean's testimony that the well could have been removed up through the glass block or by moving the pressure tank out of the way, but that there would be no logical reason to move the tank, seal the well, and then put the pressure tank back in place.

Mrs. Christiansen recalls that Vadnais told her to say if asked, that she could not remember who sealed her well. She admitted that she was not aware in 1990 that the well was improperly sealed but attributed the comment to Vadnais' feud with his brother. There was nothing in Mrs. Christiansen's testimony to suggest that her recollection about the statement, the removal of the pipe, or the fresh cement was inaccurate.

Vadnais' failure to recall whether he was working around an improperly sealed well or an unsealed well is not credible. The work space is very small, the presence of the small safe would be unusual, and Vadnais is an experienced plumber. He had the opportunity to hear the testimony of Sarafolean and Mrs. Christiansen and to view the photos to refresh his recollection.

Vadnais admitted that he was on friendly terms with Mrs. Christiansen. If the well had already been sealed by someone else, one would expect Vadnais to tell Mrs. Christiansen that her well had been sealed improperly. Vadnais testified that he referred customers who needed well work to licensed well contractors. If the well still needed sealing after the pressure tank was removed, or had been sealed improperly, one would expect him to make a referral. Vadnais neither told her that well work was needed nor made a referral.

Mrs. Christiansen and Vadnais disagree about the time spent on the job, whether the outdoor faucet was connected to the well, and many other details. Incomplete recall can be expected when the events occurred nine years ago. These points of disagreement favor neither party.

Although there was evidence that Vadnais had also installed pumps without a license, that evidence was not determinative. It may tend to show that Vadnais will knowingly violate the rules governing his trade, but, as he stated, he admitted that violation when he was cited for it. Thus, this evidence did not weigh in either party's favor.

Under Minn. Stat. § 144.99, subds. 3 and 4, the Commissioner of Health is authorized to issue orders requiring the correction of violations of applicable statutes and rules and assess monetary penalties for those violations. The maximum penalty which may be imposed for all violations identified during an inspection or review is \$10,000.^[10] Except where circumstances warrant, assessed penalties must be forgiven if appropriate corrective steps are taken before the 31st day after the order was received. Serious or repeated violations may result in the assessment of a nonforgivable penalty. The amount of penalty is calculated by application of the criteria in Minn. Stat. § 144.991, subd. 1.

Based on all the evidence, the Department has shown by a preponderance of the evidence that Vadnais improperly sealed a well without a license and that the assessed penalty is reasonable.

B.J.H.

^[1] Exhibit 8.

^[2] Exhibit 9.

^[3] Notes of that meeting were introduced as Exhibit 12.

^[4] Exhibit 13.

^[5] Minn. Stat. §§ 144.989 – 144.993 (1998).

^[6] Minn. Rules pt. 1400.8603 C (1997).

^[7] See also, Minn. Rules pt. 4725.1851 (1997).

^[8] Minn. Rules pt. 4725.3850 (1997).

^[9] Minn. Stat. § 144.99, subd. 4 (1998).

^[10] Minn. Stat. § 144.99, subd. 4.